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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 118

JOSEPH BEAUHARNAIS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITIONER'S REPLY BRIEF

(This brief is submitted pursuant to leave of Court granted November 28, 1951.)

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ARGUMENT

I

Petitioner's conviction was in violation of the First and Fourteenth Amendments to the Constitution because it was for speech in the absence of a finding of a clear and present danger by the courts or juries below.

A. A mere finding by the legislature of a clear and present danger is not a sufficient basis for restricting speech.

It should be noted at the outset that there is no specific finding by the Legislature of Illinois of a clear and present

danger. Indeed, the statute seems clearly to have been enacted in the absence of such a finding. At the time of its enactment—1917—it had not yet been held by this Court that the First Amendment applied to state action. The protection of the First Amendment as against state action was extended by this Court only in 1925 in the case of *Gitlow* v. *United States*, 268 U. S. 652. If any presumption can thus arise from the face of the legislation itself as to the existence of a legislative finding, it would therefore seem to be that the legislature did not in truth find a clear and present danger. Moreover, as pointed out in Appellant's Brief, the fact that group libel actually productive of a breach of the peace is separately punishable, would seem to indicate clearly that the legislature found no clear and present danger from other libels not so productive as here.

However, had the legislature made such a finding, it would nevertheless be incumbent upon the courts to see to it that the statute was constitutionally applied. Application would be constitutional only if there were a finding of a clear and present danger in each case. Precedent and reason support this contention. As this Court stated in *Dennis* v. *United States*, 341 U. S. 494, 514-515 (1951):

> "In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We held that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent."

The absurdity of any other doctrine is at once apparent. The circumstances which a legislature might have found to create a clear and present danger in 1917 might be completely absent in 1951. For example, a legislature might have possibly made it constitutionally criminal in

1917 to advocate (subject to the certainty required by the due process provision of the Fourteenth Amendment) the supplying of arms and ammunitions to Germany. There might have been a clear and present danger from such advocacy then; there would be none in 1951 when indeed the United States officially acts on such policy. Therefore, it is clear that the facts and circumstances of each case must be considered in detail to determine if a clear and present danger existed at the time the utterance was made as well as when the statute was passed.

B. That the advocacy here punished may have had no societal value is irrelevant.

It was suggested on the oral argument that defendant's diatribe might have been punished purely because it had no societal value. It is submitted that any such criteria in free speech cases might render the First Amendment null and void. As this Court stated in *Winters* v. *New York*, 333 U. S. 507, 510:

> "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

To state that language has no societal value is merely to state that we believe its doctrine to be false and worthless. To permit judicial censorship of utterances based upon judicial judgment of the value of the utterance is to permit judicial censorship of the worst sort. Counsel for both parties hereto are unanimous in their denunciation of Beauharnais's views and beliefs, but that gives none of us any right to pass upon their societal value, anymore than anyone—even Beauharnais, if he were sitting on this Court—would have the right to declare that statements advocating racial equality and stressing the lynchings by the white man had no societal value in his

eyes. As Mr. Justice Jackson has aptly stated in *Thomas* v. *Collins:*

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. * * *
>
> *This liberty was not protected because the forefathers expected its use would always be* agreeable to those in authority or that its exercise always would be wise, temperate, or *useful to society.* As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy." 323 U. S. 516, 545-6 (1945) (concurring opinion). (Emphasis supplied.)

C. There is no showing here of clear and present danger of violation of any law.

Illinois suggests that the clear and present danger in the case at bar is to be found in the (1) tendency (2) to incite (3) such prejudice (4) as results in violation of the Illinois Civil Rights Act. If this criterion of clear and present danger four times removed is to be the test, then clearly any propaganda against any law could be similarly outlawed, for does not every publication which criticizes a law tend to incite such prejudice as results in its violation—consider, for example, agitation against the law of Prohibition. Surely propaganda against it helped to incite its violation, but such an indirect effect through change in mental attitude can hardly be a reason for outlawing the original advocacy. As stated by Justices Brandeis and

Holmes in their celebrated concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376 (1927):

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law breaking heightens it still further. *But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.*" (Emphasis supplied.)

Cf. *Musser* v. *Utah*, 333 U. S. 95.

It may also be questioned whether a request that the City Council provide segregation in apartment houses—the only purpose of defendant's diatribe—would result in violation of the Illinois Civil Rights Act prohibiting discrimination in places of public accommodation.

The contention that advocacy of change in law can be constitutionally prohibited when passage of the law itself would clearly be illegal is as novel as it is startling. While we have never before heard it suggested that segregation is a violation of the Federal Civil Rights Act, and while we attorneys for the American Civil Liberties Union have never been so bold as to make that invalid suggestion

ourselves in our efforts to combat segregation, it would be a serious impediment to free speech to limit the right to petition the legislature for redress of grievances—a right specifically protected by the First Amendment in addition to the right of free speech—to the situation where the act of the legislature would not clearly be illegal. The mistake of counsel for the State of Illinois in believing that the Federal Civil Rights Act prohibits segregation shows clearly the repressive effect any such doctrine would have, for under his theory, no one in Illinois dare advocate the passage of segregation laws, though this Court has refused to hold such laws unconstitutional *per se*.

D. The lack of any record to show the existence of the clear and present danger at the time of defendant's offense cannot be remedied by the device of judicial notice.

Mr. Justice Frankfurter upon the oral argument requested counsel for Illinois to submit a memorandum on the state of race relations in Illinois for the past few decades. Counsel for petitioner respectfully points out that while such a memorandum on pre-1917 and 1917 conditions may be helpful in determining whether the legislature could reasonably have found the existence of a clear and present danger, the legislature made no such finding.

In any event we ask the Court to reject the novel doctrine advanced by Illinois that the Court can take judicial notice of the alleged existence of a clear and present danger half way across the continent at the time of petitioner's trial. This Court has stated that it will in free speech cases always scrupulously review the record as to the existence of a clear and present danger. To use the Court's own words, "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our

Constitution." *Dennis* v. *United States*, 341 U. S. 494, 516. It is respectfully submitted that the Court cannot thus scrupulously review a record if there is no record to review, for the courts below did not even themselves take judicial notice of a clear and present danger.

Admitting *arguendo* that the existence of a clear and present danger is a question of law, the decision as to its existence must nonetheless be based in each case upon judgment as to the facts and circumstances surrounding the prescribed utterance. To deprive petitioner of a hearing upon this vital issue would be a violation of due process of law in contravention of the Fourteenth Amendment, for to permit a conviction to stand on a theory of clear and present danger when petitioner had not been notified of such a finding at his trial would be to convict him of an offense he had never been charged with. *De Jonge* v. *Oregon*, 299 U. S. 353; *Cole* v. *Arkansas*, 333 U. S. 196.

A hearing on the issue of clear and present danger below might well have taken into account many factors which the Court could not consider even through the device of judicial notice. For example, it is conceivable that competent psychiatric testimony might have been obtained to show that defendant's diatribe, far from inciting to violence, sublimated any violent tendencies on the part of the receivers of the literature by directing them into channels of petitioning the legislature. The statements which the State of Illinois might now submit to this Court in its memorandum as to the causative factors of riots in Illinois might have been the subject of cross-examination and confrontation of witnesses. To deny this right by the device of the Court taking judicial notice through perusal of the memorandum of the State of Illinois would thus deprive petitioner here of his right to cross-examination and confrontation of witnesses in violation of the Sixth and Fourteenth Amendments to the Constitution. In any event, no clear and present danger

having been found below, this Court cannot now determine the issue *ab initio*.

Judicial notice is, after all, reserved for matters as to which there can be no dispute. Which factors cause race riots is frequently a matter of dispute, as is the very existence of the danger of the riots. To take judicial notice of a hotly controverted question would be to do violence to the concept of due process. The particular evil of the precedent here sought to be avoided is made manifest by putting the shoe on the other foot. Suppose this were a case involving prosecution of a Negro for making defamatory statements against the white race in a Southern state. Were this Court to take judicial notice in the case at bar, it would then be open for the courts of that state to take judicial notice of the existence of a clear and present danger from the utterance of its Negro citizen and to punish him therefor. This Court would doubtless want a record upon which to review that finding. It would be startling indeed were this Court then to reverse a finding by judicial notice of the state court. Judicial notice is not meant for cases of this sort. Judicial notice in this type of case would open the way to judicial tyranny and leave this Court powerless to reverse.

E. Defendant's emphasis upon the seriousness of the situation cannot take the place of a finding of clear and present danger, lacking in this case.

Petitioner's statement that the white population is "seething, nervous and agitated" and that "there have been disastrous incidents within the past year" cannot be substituted for a finding by the Trial Court that a clear and present danger was in existence and that defendant's utterance made the situation even more dangerous. To permit a speaker's statement that the situation is erious—a useful tool of argument—to be substituted for a finding by the Court of clear and present danger

would be to restrict speech by requiring that the speaker never emphasize the seriousness of the situation. Petitioner's diatribe, advanced—whether in good faith or not—as a palliative for a serious situation cannot be held constitutionally prohibited because he thought the situation was serious. In any event, there is nothing in the record whatsoever to indicate *any* danger from the particular publication of defendant's here in question. There is no proof that even one person was swayed by his utterances—either to violence or to petitioning the legislature.

II

Unconstitutional vagueness is not cured merely by framing a statute in terms of a common law meaning.

A. Casting of a statute in common law terms does not cure other vagueness.

In striking down a New York statute, this Court, in *Winters* v. *New York*, 333 U. S. 507, relied on many indicia of vagueness. The statement quoted in respondent's brief from *Winters*, to the effect that the operative clause of the statute has no technical or common law meaning, was but one of the many objections to the statute. The essence of the *Winters* case is to be found in its following language, at pages 509 and 520:

> "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment . . .
>
> "When a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

That this statute may penalize many innocent acts is apparent from its face. For example, were the Illinois courts to construe the term "creed" as inclusive of political creeds, it might be criminal to state that the Progressive Party is a Communist organization, or that a political party is trying to pack this Court, or that a political party has in its ranks many grafters, bribers, and corrupt persons—and Illinois has conceded on the oral argument that under its theory of constitutional law, such statements could constitutionally be made criminal. It might also be criminal under this statute to report criminal statistics if they demonstrated that one race had a higher percentage of criminals among it than did another. And, finally, the whole common law crime of blasphemy might be revived under this statute—and what that would mean in terms of violations of free speech is graphically illustrated in Schroeder, *Constitutional Free Speech* (1919). In short, "the Illinois statute is too broad to enable convictions * * * to stand." Tanenhaus, *Group Libel*, 35 Cornell Law Quarterly 261, 283 (1950).*

B. But even a common law definition of individual libel becomes vague and indefinite when transferred to the context of group libel.

What constitutes language defamatory of an individual has been in itself a subject of much judicial confusion. (See, *passim*, Ernst and Lindey, "Hold Your Tongue!", 1950.) But even assuming that there is enough judicial certainty to give adequate guide to an individual as to when he is guilty of defamation of an individual,

* For an historical survey of the law of criminal libel, both group and individual, this Court is respectfully referred to the Tanenhaus article and another impartial survey, Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Col. L. Rev. 727 (1942). The authors of this brief feel that there is nothing of value that they can add to these thorough historical surveys.

it is submitted that there is practically no law whatsoever as to when he is defaming a group. It should be noted in this connection that some of the learned members of this Court themselves were not sure whether or not the words in the diatribe here in question were libelous when applied to a race. Aside from the difficulty of determining which words are defamatory, there is the question of whether the words must be defamatory of all the members of the class or whether it is sufficient that it be defamatory of a few of them. Approaching this problem, as it were, *tabula rasa*, it would seem that only defamation of *all* members of the class would be considered libel, since there is hardly a class of any type which does not have within it some members who are truly guilty of the conduct described by the defamatory words. But there is no such clarification from the courts of Illinois.

Debate on the issue would seem to have been foreclosed by the decision in the *Winters* case, which cited favorably (333 U. S. at 516-517) the decision of a New Jersey court in the *Klapprott* case holding void for vagueness a statute also couched in terms of common law libel, terms almost identical with those at issue here. The thrust of the statute in *Winters* was against vulgar magazines. The thrust of the statute at bar is against political and social debate on vital issues. Surely this Court must give such debate the equivalent of the protection it gave to the vulgar magazines.

In *Winters*, as here, the statute did not require any intent or purpose as a condition to a finding of guilt. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, a statute in vague terms was construed so as to be rendered constitutional by adding the requirement that the utterance incite to breach of the peace. No such construction was made of the statute here by Illinois.

C. The doctrine of "fighting words" is not applicable to this case.

Where words themselves "tend to incite an immediate breach of the peace" in a face-to-face situation, such "epithets or personal abuse" may of course be constitutionally prohibited. *Chaplinsky* v. *New Hampshire,* 315 U. S. at 572. But publication of literature as here is not a face-to-face situation, nor were epithets or personal abuse involved. And even if epithets and abuse were involved, surely in the context of discussion of social issues, even such abuse must be protected this side of the existence of a clear and present danger. In face-to-face street encounters, personal abuse may well be outlawed; were pamphlets to be restricted whenever abuse of groups was involved, then freedom of speech would be severely limited. The pamphlets of Tom Paine, the satire of Voltaire and Swift, much campaigning of political parties —all would be outlawed were abusive language in publications to be the subject of censorship. As this Court has truly stated, speech may well serve its highest purpose when it stirs people to anger. *Terminiello* v. *Chicago,* 337 U. S. 713.

* * * * * * *

Risk there is, to be sure, in allowing the mouthings of bigots—but no risk, here at any rate, of a clear and present danger of a serious substantive evil. There is always risk in speech, but a risk considered well worth running by our forefathers who wrote the Bill of Rights. It is a risk that must be run if truth and freedom are to prevail.

There is something almost ludicrous in the spectacle of the full majesty of the law swooping down upon the bigot Beauharnais to punish him for his absurd utterances. But whatever the wisdom of such punishment, it is freedom

that is at stake. Yesterday it was the freedom of twenty-five members of Jehovah's witnesses (see Appendix A, p. 15); today it is Beauharnais' freedom; tomorrow it may be the freedom of a Negro to ask for a civil rights program because of the lynchings of the white man. This side of a clear and present danger, the freedom of all must prevail.

Respectfully submitted,

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APPENDIX A

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December 2, 1951

Herbert M. Levy, Esq.
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New York, N. Y.

Dear Mr. Levy:

This is in response to your telephone request that I supply you with information as to the number of cases that were pending against Jehovah's witnesses under Chapter 38, Section 471, Illinois Criminal Code (Revised Statutes of Illinois), identified by you as the "Group Libel Law of Illinois", at the time that the case of Bevins et al. *v.* Prindable et al., was submitted to the Court.

At that time there were 23 cases at Belleville and 3 cases at Harrisburg pending.

Following the filing of the memorandum opinion by the Court on October 13, 1941, affirming the district court (314 U. S. 573), two test cases were selected for trial. Convictions were entered in the circuit court. Appeals were taken directly to the Illinois Supreme Court because of constitutional questions raised. The Illinois Supreme Court dismissed the prosecutions and held that the door of a private residence, where the offense was committed, did not constitute a public place. As a result, the prosecutors in Belleville and Harrisburg dismissed all the cases. See People of Illinois *v.* Simcox, 379 Ill. 347, 40 N. E. 2d 525.

Sincerely,

HAYDEN C. COVINGTON

HCC:J